83-1162

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

ANTHONY PICCOLO,
Petitioner

-vs-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No. 81-1238

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STATEMENT OF QUESTIONS PRESENTED

I. Whether the count charging conspiracy to possess cocaine with intent to distribute and to distribute cocaine was impermissibly vague when no co-conspirators of petitioner were named in the indictment although known to the grand jury and when the jury could have found from the testimony the existence of three separate conspiracies.

II. Whether the district court abused its discretion by admitting into evidence hearsay statements of alleged co-conspirators when the only evidence linking petitioner with the conspiracy was contained in the hearsay statements themselves.

III. Whether the district court erred in its charge to the jury by not instructing the jury as to the prosecution's theory of the conspiracy charged and did not instruct the jury what facts they had to find proven to convict the petitioner where petitioner's complaint before trial and during trial that he could not determine from the indictment what he was charged with was pervasive.

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AUTHORITIES CITED

JURISDICTION OF THE COURT

The Opinion of the Court of Appeals sought to be reviewed is the *en banc* Opinion dated December 16, 1983; the Opinion was filed on December 16, 1983.

Jurisdiction to review this Opinion is conferred, it is believed, upon this Court by 28 USC 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES INVOLVED

21 USC § 846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by impris-

onment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 USC 841(a)(1):

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENT OF THE CASE

Petitioner was charged in a three count indictment with the commission of the offenses of (1) conspiracy to distribute cocaine, (2) possession with intent to distribute of cocaine, and (3) distribution of cocaine in the United States District Court for the Eastern District of Michigan, Southern Division.

The case was tried to a jury. Petitioner was convicted on all three counts.

The court sentenced petitioner to a term of five years on the conspiracy count and to a single five year term of the remaining two counts. The two sentences were to run concurrently.

Petitioner appealed his convictions to the United States Court of Appeals for the Sixth Circuit. A panel of that court reversed petitioner's conviction on the conspiracy count and remanded the case to the district court for resentencing on the remaining two counts with instructions that petitioner could be sentenced on only one of the two remaining counts because the counts were multiplicitous. *United States* v *Piccolo*, 696 F2d 1162 (CA6 1983) See Appendix, page 16a.

The Court of Appeals voted to rehear the case *en banc*.

On rehearing, the Court of Appeals affirmed petitioner's conviction on the conspiracy count and remanded the case to the district court for resentencing on the two remaining counts, the court holding that although petitioner could be convicted on both of the two remaining counts, he could not be sentenced on both. See Appendix, page 2a.

STATEMENT OF PERTINENT FACTS

Count One of the indictment charged that between August 1, 1977 and June 21, 1979, petitioner 'did knowingly, intentionally, and unlawfully combine, conspire, confederate, and agree together with various other persons whose names are both known and unknown to the Grand Jury . . . to possess with intent to distribute and to distribute various quantities of cocaine . . .'

Three overt acts were alleged: (1) that on February 15, 1979, petitioner met with one Allen and one Marcangello at petitioner's residence; (2) that on the same date, Allen and Marcangello travelled together to the Hyatt Regency Hotel; and (3) on the same date, Marcangello distributed 108 grams of cocaine at the Hyatt Regency Hotel.

Allen testified that on February 15, 1979 he met with a government agent, Finnigan, and another agent; the agents said they were interested in buying four ounces of cocaine. Allen went to Marcangello's home and asked Marcangello if he were interested in making the deal. Marcangello said he was, but he didn't have four ounces. Marcangello said he had to get it from 'Pic'. Marcangello made a call and said 'we'll have to go over there'. Allen and Marcangello went to petitioner's home and entered. Petitioner and Marcangello went into the kitchen, came back, and Allen and Marcangello left. In the car, Marcangello 'said something to the effect that he had it'. Allen and Marcangello drove to the Hyatt Regency Hotel, and met agent Finnigan and other agents; the agents wanted to know 'how good the stuff was' and 'we said that it had just been picked up'.

Finnigan testified that in the hotel room, Marcangello 'stated that Mr. Allen had picked Mr. Marcangello up and driven straight to the source of the cocaine and had come straight from the source to my hotel room'. Agent Rassey testified much to the same effect as did Finnigan. Four ounces of cocaine were delivered to the agents in the hotel room.

One Keith Smith testified that in the fall of 1976, he met petitioner at one Parese's home. Keith worked for Parese in Parese's illegitimate business of cocaine, PCP and marijuana. In the first part of 1977, Smith met petitioner in a parking lot and gave petitioner a small package upon Parese's instructions. Smith gave petitioner or received from petitioner cocaine on at least six times. In the middle of 1979, Smith went to the petitioner's home and was given a package to take to Parese; when Smith delivered the package to Parese, the package was opened and cocaine was inside. Parese and petitioner were 'more or less like brokers' and they would call upon one another to bring product and people together.

The recitation of facts in the majority opinion—see page 3a of Appendix—concerning meetings of petitioner with Allen subsequent to February 15 is somewhat misleading. Allen said he had a telephone conversation with petitioner but he didn't 'think we discussed specifically cocaine' [Trial Tr Vol I, p218]; they discussed 'the people that were supposed to be doing this buying' and Allen didn't 'really remember [petitioner] saying too much at all except what kind of people they were' [Trial Tr Vol I, pp218-19]. Agents Finnigan and Rassey were not aboard Allen's boat; Allen testified that he and Marcangello and petitioner 'went out and the discussion was had again about the people involved, about people who would buy and whether they were good, whether they were, how I know them, could I stand up for them and all I could say I know about them is whatever I've told you what Blue has told me' and that petitioner 'said I hope they are, I hope they, you know, not that they are not good people but that we can trust them' [Trial Tr Vol I, p219].

REASONS FOR GRANTING THE WRIT

I.

Before trial, petitioner filed a motion to quash the indictment alleging, *inter alia*, that the conspiracy count was not specific enough in that it failed to adequately specify the nature, scope and goal of the conspiracy. Petitioner claimed that he could not prepare for trial, that the indictment did not adequately protect him from double jeopardy, and that the indictment did not nail down the prosecution to a single theory of conspiracy and allowed the prosecution to adjust its theory to accord with the facts as developed on trial.

Petitioner had also filed a 'motion *in limine*' which sought, *inter alia*, 'to exclude testimony dealing with other criminal acts'. The district court overruled this motion upon the government's insistance that the evidence of petitioner's other crimes was admissible under FRE 404(b).

The evidence admitted under FRE 404(b) was that of Keith Smith, outlined above.

The government attorney, in his argument to the jury, extensively reviewed with the jury the testimony of Keith Smith and opined as to its significance as follows:

> 'The only reasonable conclusion from the evidence is that Anthony Piccallo (sic) was the source of the cocaine on February 15th, 1979; *that he conspired with Ernie Marcangello and Jerry Allen during that period of February until June of 1979 to provide cocaine to the agent and that that was part of the later conspiracy that had gone on for two years at least with other individuals.*' [Emphasis added.]

Thus, from the evidence presented on trial, the jury could have found one of three conspiracies proven. The dissenting opinion in the Court of Appeals stated that '[t]he jury could very well have construed the evidence to establish two separate conspiracies—one between Finnigan, Ras-

say, Allen and Marcangello and another between Allen, Marcangello and Piccolo'. [See Appendix, p 2a-3a] Petitioner maintains that the jury might also have found a conspiracy between petitioner and Parese or between petitioner and Parese and Keith Smith.

The difficulty starts with the indictment. No co-conspirator of petitioner, indicted or non-indicted, was named in the indictment as a co-conspirator. All of the persons referred to by name on trial who could have been co-conspirators were known by name to the government and to the grand jury. It would have been a simple matter for the grand jury to apprise petitioner of precisely who they found had conspired with him by naming him or them in the indictment.

Should not this Court finally establish the principle that if the co-conspirators are known to the grand jury, the co-conspirators must be named in the indictment?

The more enlightened view, it would seem to the writer, is that 'the better practice is to name the conspirators in the bill if their identity is known', *State* v *Gallemore*, 158 SE2d 505, 510 (NC 1968), *State* v *Andrew*, 184 SE2d 69 (NC 1971) since '[h]appily, the rule that an indictment, to be sufficient, must contain all the elements of a crime "and sufficiently apprise the defendant of what he must be prepared to meet" is still a vital part of our Federal criminal jurisprudence', *United States* v *Knox Coal Company*, 347 F2d 33, 36 (CA3 1965), especially in view of the fact that 'unless the charging part of a conspiracy count specifically refers to or incorporates by reference allegations which appear under the heading of the overt acts, resort to those allegations may not be had to supply the insufficiency in the charging language itself', *United States* v *Knox Coal Company*, *supra*, at 38.

Under the rule of *Russell* v *United States*, 369 US 749 (1962) specificity in the indictment is required not only as a check on the grand jury but also as a restraint upon the

prosecutor to prove only that crime which is charged in the indictment. What *Russell* warned against was the conviction of the accused on the basis of facts not found by the grand jury or perhaps not even presented to the grand jury:

> 'To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.' 369 US at 770.

The difficulty entailed by the non-specific conspiracy count was compounded when on trial the district judge did not instruct the jury on the government's theory of the case and did not instruct the jury what conspiracy was contemplated by the indictment, who the alleged co-conspirators were, and what the alleged goal of the conspiracy was. The district judge merely stated the general principles of conspiracy law to the jury and did not relate the legal principles to the facts in the case. See III below.

Petitioner, in order to learn what it was he had to meet on trial, moved the district court before trial for a bill of particulars. This motion was denied. Perhaps under *Rule 7(f), FRCP*, a bill of particulars should not be granted as a tool of discovery, *United States* v *Hill*, 589 F2d 1344, 1352 (CA8 1979), still it is clear that the court should grant a bill of particulars to assist the accused to learn what he must be prepared to meet on trial, *Leverkuhn* v *United States*, 297 F 590 (CA5 1924).

Thus, we have a situation wherein the conspiracy count of the indictment named the petitioner as a conspirator but named no other co-conspirator, wherein the district judge did not instruct the jury what conspiracy they had to find proven before petitioner could be convicted, and wherein

the government attorney in argument to the jury suggested that petitioner conspired with Allen and Marcangello and with others who included Keith Smith and Parese. And, as pointed out above, the testimony adduced on trial could have formed a basis for the jury's finding at least three different and distinct conspiracies each with a different goal.

In *Russell, supra,* the Court noted that it is difficult to imagine a case in which the insufficiency of an indictment resulted in a complete failure to inform the accused of the nature of the accusation against him. In the case at bench, the petitioner knew that under the first count of the indictment he was accused of conspiracy to deliver cocaine. But the cryptic form of the indictment 'left the prosecution free to roam at large' and 'to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial', 369 US at 768.

II.

If the conspiracy which the grand jury had in mind was a conspiracy between Allen and Marcangello, then it was incumbent upon the government to prove that petitioner became a member of that conspiracy. The only evidence adduced by the government which could possibly tie petitioner to the conspiracy were hearsay statements of the asserted co-conspirators.

Allen testified that Marcangello stated to him that Marcangello would have to get the cocaine from 'Pic' and after Allen and Marcangello left petitioner's home, Marcangello said 'something to the effect that he had it'. Agent Finnigan and Agent Rassey testified that when Allen and Marcangello delivered cocaine to them on February 15, Allen and Marcangello said that they had just come from the source directly to the hotel.

In the Sixth Circuit in *United States* v *Vinson*, 606 F2d 149 (CA6 1979), the Court held that the hearsay statements

themselves could be considered by the trial court in determining whether the accused's connection with the conspiracy had been established by a preponderance of the evidence. The Court reasoned that *Fed Rule Evid 104(a)* had altered existing law so as to authorize the consideration of the challenged hearsay statements to decide the question of their admissibility.

Thus, in the case at bench, the district judge considered the hearsay statements of Allen and Marcangello in determining whether petitioner's connection with the conspiracy had been established by a preponderance of the evidence as a predicate for the admission into evidence of the hearsay statements.

As Justice White noted in dissent in *Arnott* v *United States*, No 82-2028, US , 104 S Ct 364 (1983), '[t]he rule adopted by the Sixth Circuit [ ] conflicts with the one enunciated by every other Court of Appeals that has addressed the issue'. The cases from the other circuits are cited by Justice White in his dissent.

For the reasons given by Justice White in his dissent, this Court should resolve the question whether the Sixth Circuit rule pertaining to the admission of co-spirators' hearsay statements which has been repudiated by every other circuit has legal validity.

III.

The district judge in his charge to the jury did not instruct the jury on the government's theory of the case and he did not instruct the jury as to precisely what conspiracy was charged in the indictment. As to what conspiracy was charged, the district judge told the jury the following:

> 'The indictment charges a conspiracy between the defendant and other persons. A person canno (sic) conspire with himself and, therefore, you can not find the defendant guilty unless you find beyond a reasonable

doubt that he participated in the conspiracy as charged with at least one other person whether named in the indictment or not. However, there cannot be a conspiracy between a person and a government agent.' Trial Tr, Vol III 182-183.

The district judge also instructed the jury on the general principles of conspiracy law, but he did not relate the legal principles to any of the facts in the case, and he did not tell the jury what facts they had to find proven in order to fulfill the requirements of the legal principles.

Hence, the jury, under the above instruction by the district court, was free to roam and rummage about in all the evidence adduced by the government and decide whether petitioner conspired with at least one person—Allen, Marcangello, Prese, Smith, or some other unnamed person—and to convict petitioner on that basis. *And there is no way of telling whether the conspiracy found by the jury was the conspiracy the grand jurors had in mind when they handed up their indictment.*

While the district judge's instructions reflected correct legal principles, they did not adequately inform the jury as to what they had to find proven in this particular case in order to convict the petitioner. A trial judge has a duty to give instructions that are meaningful not only in terms of abstractions of law, but also in terms of the facts of the particular case. *Choy* v *Bouchelle*, 436 F2d 319 (CA3 1970); *Mitchell* v *United States*, 394 F2d 767 (CADC 1968); *Marshall* v *Isthmian Lines*, 334 F2d 131 (CA5 1964).

Petitioner was put out of court on this issue by the Sixth Circuit Court because petitioner did not object to the district court's charge on trial.

But, as stated by the plurality opinion of the original panel in the case at bench, '[t]he pervasive theme running through defendant's claims below and before this Court concern the vagueness of the conspiracy alleged' and that 'the defendant claims that, from the outset of the trial to the

verdict, there was an absence of specificity on the issue of exactly which conspiracy Mr. Piccolo allegedly joined; the indictment was not specific; the court rejected his request for a bill of particulars; in ruling upon the defendant's motion *in limine*, the court failed to specify what conspiracy the defendant joined and failed to make specific findings as to whether the statements offered were in furtherance of the yet unstated goal or purpose of that conspiracy'. See 696 F2d at 1166, or page of Appendix hereto.

The true office of an objection to the trial court's charge to the jury is to alert the court to possible error so that the trial court might take timely measures to avoid commission of error in the charge. Petitioner had in pre-trial motions and during trial by objections and arguments urged to the trial court *ad nauseam* the issue of the nonspecificity of the charged conspiracy. If the trial judge at the time it came to charge the jury did not comprehend that petitioner's main complaint was that he and perforce the jury did not know what conspiracy was charged in the indictment, an objection at the end of the court's jury charge reiterative of all the arguments made by petitioner prior to trial and during trial would not have served to have alerted the trial judge to that issue and saved the judge from committing error in his charge in terms of failing to instruct the jury as to what conspiracy was charged in the indictment and what the jury had to find proven in order to properly convict petitioner.

It is an unrealistic and punitive return to archaic forms of advocacy to require this petitioner to go through the form of making objection to the court's charge to the jury on an issue thoroughly explicated by petitioner to the court throughout the course of the case and carefully considered and understood by the court and rejected by the court.

The court's charge to the jury did not fulfill the function of a jury charge, and it was plain error for the district judge not to instruct the jury—even in the absence of a request for instuctions and an objection to the charge—clearly and pointedly what facts they must find proven beyond a reasonable doubt before they could convict the petitioner.

CONCLUSION

It is respectfully urged to this Court that the foregoing issues involve important questions of constitutional law and the proper administration of justice in the federal courts that should be addressed and settled by this Court.

RELIEF SOUGHT

Petitioner respectfully prays this Court issue its Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,
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Detroit, Michigan
January 10, 1984

APPENDIX

No. 81-1238

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY PICCOLO,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed December 16, 1983

Before: LIVELY, Chief Judge; EDWARDS, ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE, KRUPANSKY, and WELLFORD, Circuit Judges; BROWN, Senior Circuit Judge.

KRUPANSKY, Circuit Judge, delivered the opinion of the Court, in which Judges LIVELY, EDWARDS, ENGLE, [redacted], MERRITT, KENNEDY, MARTIN, [redacted], CONTIE, WELLFORD and BROWN hase concurred. JONES, Circuit Judge, (pp. 13-15) filed a separate dissenting opinion in which KEITH, Circuit Judge, concurred.

KRUPANSKY, Circuit Judge. This is an appeal by Anthony Piccolo (Piccolo) from his jury conviction on separate counts of conspiracy to distribute, possession with intent to distribute, and distribution of cocaine. 21 U.S.C. §§ 846, 841(a)(1).

The defendant here principally contends that the indictment charging him with conspiracy was impermissibly vague, which allegedly resulted in the erroneous admission of co-conspirator statements, insufficient jury instructions, and placing Piccolo at risk of double jeopardy. A prior panel decision of this Court, *United States* v. *Piccolo*, 696 F.2d 1162 (6th Cir. 1983), reversed the conspiracy conviction and remanded for a redetermination of the sentence imposed on the remaining counts. *En banc* review was granted, thus vacating the prior opinion.

The facts adduced at trial established that two federal undercover agents, Joseph Finnigan (Finnigan) and Joseph Rassey (Rassey), together with an informant named John Blue (Blue), met with a Detroit attorney involved in the narcotics trade, one Jerome Allen (Allen), in early 1979 for the purpose of purchasing cocaine from Allen. On February 1, 1979, Allen and Ernest Marcangello (Marcangello) delivered a sample of cocaine to the agents through Blue. A subsequent meeting between agent Finnigan and Allen was conducted and plans were formulated for a future purchase of drugs.

On February 15, a sale was arranged to occur later that day at the Hyatt Regency Hotel. In preparation for the transaction, Allen travelled to Marcangello's home, whereupon Marcangello stated that he did not have the cocaine required but would have "to get it from 'Pic.'" Marcangello telephoned the defendant, and together Allen and Marcangello proceeded directly to Piccolo's residence while under surveillance by federal agents.

Both Allen and Marcangello entered Piccolo's home. Allen testified that once inside the house, Piccolo and Marcangello went into the kitchen, and when they returned, Allen and Marcangello departed. In the automobile, Marcangello told Allen that he "had it" and the two travelled to the sale location.

Subsequently, the two undercover agents met Allen and

Marcangello in a hotel room. During a conversation which was recorded and admitted as evidence, agent Finnigan expressed doubt about the quality of the cocaine, which provoked a response from both Allen and Marcangello that they had brought the cocaine straight from the source [Piccolo]. The agents paid $8,000 for approximately four ounces of cocaine and inquired about larger and regular purchases of cocaine. Marcangello advised that such a relationship could be arranged, and that his source was Italian and about twenty years older than himself.

Subsequent to the February 15 meeting, the agents continued to discuss future cocaine sales with Allen and Marcangello. In turn, Allen, Marcangello and Piccolo met together on Allen's boat where Piccolo questioned Allen and agents Finnigan and Rassey, specifically inquiring as to the trustworthiness of the agents. Piccolo also had a telephone conversation concerning the trustworthiness of the undercover purchasers with Allen.

Piccolo was indicted on July 22, 1980 upon the following charges:

The Grand Jury Charges:
Count One

> That from on or about August 1, 1977, and continuing thereafter up to and including June 21, 1979, within the Eastern District of Michigan, Southern Division and elsewhere, ANTHONY PICCOLO, defendant herein, did knowingly, intentionally, and unlawfully, combine, conspire, confederate, and agree together with various other persons whose names are both known and unknown to the Grand Jury, to commit an offense against the United States, that is, to possess with intent to distribute, and to distribute various quantities of cocaine, a Schedule II, Narcotic Drug Controlled Substance, contrary to the provisions of Section 841(a)(1), of Title 21, United States Code, all in violation of Section 846, Title 21 United States Code.

It was part of said unlawful conspiracy that ANTHONY PICCOLO, defendant herein, and various co-conspirators would possess with intent to distribute and distribute said narcotic drug controlled substance (cocaine) within the Eastern District of Michigan, Southern Division, or would aid and abet each other in the distribution of said narcotic drug controlled substance (cocaine) within the Eastern District of Michigan and elsewhere;

In furtherance of said unlawful conspiracy, and to effect the objectives thereof, the defendant and various co-conspirators named herein, committed the following overt acts:

OVERT ACTS

1. On February 15, 1979, ANTHONY PICCOLO, defendant herein, met with A. Jerome Allen and Ernest Marcangello at Piccolo's residence located at 19710 Shady Lane, St. Clair Shores, Michigan.

2. On or about February 15, 1979, A. Jerome Allen and Ernest Eugene Marcangello travelled together to the Hyatt Regency Hotel, Fairlane Town Center, Dearborn, Michigan.

3. On or about February 15, 1979, Ernest Eugene Marcangello distributed approximately 108 grams of cocaine at the Hyatt Regency Hotel, Fairlane Town Center, Dearborn, Michigan.

All in violation of Section 846, Title 21, United States Code.

Count Two

That on or about February 15, 1979, in the Eastern District of Michigan, Southern Division, ANTHONY PICCOLO, defendant herein, did knowingly, intentionally, and unlawfully possess with intent to distribute approximately 108 grams of cocaine, a Schedule II, Nar-

cotic Drug Controlled Substance; in violation of Section 841(a)(1), Title 21, United States Code.

Count Three

That on or about February 15, 1979, in the Eastern District of Michigan, Southern Division, ANTHONY PICCOLO, defendant herein, did knowingly, intentionally, and unlawfully distribute approximately 108 grams of cocaine, a Schedule II, Narcotic Drug Controlled Substance; in violation of Section 841(a)(1), Title 21, United States Code.

THIS IS A TRUE BILL

The defendant charges in this appeal that the conspiracy count as drafted in the indictment is vague and indefinite, in that not all of the co-conspirators are identified, thereby permitting the prosecution to alter or modify the offense at will to conform with the testimony developed at trial. The original panel agreed, and concluded that the indictment was "not specific enough to cabin the prosecutor and prevent him or her from 'roaming' at large." 696 F.2d at 1167. This decision was based upon both a purported failure of the indictment to conform to essential Constitutional standards and the cumulative effect of evidentiary variances at trial which resulted from the ambiguity of the indictment.

Preliminarily, it must be emphasized that conformity of the indictment with Constitutional standards and conformity of evidence adduced at trial with the indictment are two wholly distinct areas of inquiry.

The basic Constitutional standard by which to judge the sufficiency of an indictment is mandated by the Sixth Amendment which requires that the indictment inform the defendant of "the nature and cause of the accusation." U.S. Const., Amend. VI. This standard is expressed by Fed. R. Crim. P. 7(c)(1), which states, in part, that the indictment "shall be a plain, concise and definite written statement of the essential

facts constituting the offense charged." The landmark Supreme Court opinion of *Russell* v. *United States*, 369 U.S. 749 (1962), does not represent an enlargement of this Constitutional requirement that an indictment afford notice of the specific charged offense; *Russell*, instead, elucidates the criteria by which the sufficiency of an indictment may be measured.

Specifically, *Russell* teaches that notice is sufficient when it permits the defendant to obtain "the significant protections which the guaranty of a grand jury indictment was intended to confer." 369 U.S. at 763. In other words, the adequacy of the notice is measured by its effectiveness in securing the intended benefits. The Court, in particular, "emphasized two of the protections which an indictment is intended to guarantee," *id.*, and established them as the "preliminary criteria" by which an indictment is to be tested:

> [F]irst, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and, secondly, "'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'"

369 U.S. at 763-764 (citations omitted).

It is conceded in the case at bar that the information provided in the indictment is fully adequate should Piccolo be required to interpose his present conviction as a bar to double jeopardy. Indeed, the indictment clearly specifies the amount and type of narcotics involved, the precise date of sale, and the location of the sale. At issue, then, as in *Russell*, is Piccolo's contention that the conspiracy count "failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested; i.e., that [it] failed to sufficiently apprise the defendant 'of what he must be prepared to meet.'" *Id.* at 764.

Essentially, Piccolo argues that the failure of the indictment to particularly identify every member of the conspiracy permitted the prosecution to continually interpose alternate conspiracies at trial to conform with the evolution of the evidence. The panel agreed and found that the prosecution was "free to roam at large – to shift its *theory of criminality* so as to take advantage of each passing vicissitude of the trial and appeal." *Russell, supra*, at 768 (emphasis added). In fact, the theory of criminality articulated in the indictment was, and is, unalterably clear.

Initially, the government's 'theory of criminality" in the indictment against Piccolo rests upon an allegation of conspiracy. Regardless of whether Piccolo was the "principal" conspirator, dispatching the others as sales "agents," or whether Marcangello was the "principal" and Piccolo was the conspiracy's "agent" who acquired the cocaine from suppliers, the government's "theory of criminality" was that Piccolo was a full member of the conspiracy, not simply an individual operator who sold to Marcangello or an unwitting dupe. *See United States* v. *Hamilton*, 689 F.2d 1262, 1270 (6th Cir. 1982). This theory of criminality was fully set forth in the indictment and was unvarying throughout the trial.

Further, the theory promulgated in the indictment was that the conspiracy had as its object the possession coupled with the intent to distribute cocaine. Far from writing the prosecutor a "blank check" to be completed at trial with any criminal enterprise that could be fashioned from the activities of Piccolo and any other associate, the grand jury left no doubt that the conspiracy it had in mind was conceived with a calculated design to distribute cocaine. Again, there is no evidence that the government abandoned or ignored this theory at trial.

Moreover, the theory of criminality formulated in the indictment plainly stated that this conspiracy, which particularly intended to possess and distribute cocaine, and which specifically included Piccolo as a full member, acted between

given dates, and committed a definite series of overt acts on February 15, 1979 through two named individuals. Despite this degree of definition, Piccolo argues that the inclusion of other unnamed co-conspirators in the indictment freed the government to construct fanciful or alternate conspiracies at trial, wholly unknown to the grand jury.

The case authorities are concise that a valid indictment may charge a defendant with conspiring with persons whose names are unknown. *Rogers* v. *United States*, 340 U.S. 367 (1951); *United States* v. *Allen*, 613 F.2d 1248 (3rd Cir. 1980); *United States* v. *Rivera Diaz*, 538 F.2d 461 (1st Cir. 1976). Indeed, as noted in *United States* v. *Davis*, 679 F.2d 845, 851 (11th Cir. 1982), it is the grand jury's statement of the "existence of the conspiracy agreement rather than the identity of those who agree" which places the defendant on notice of the charge he must be prepared to meet. Certainly, it cannot be argued that the indictment against Piccolo is invalid because it included unnamed co-conspirators who were unknown to Piccolo; it is not essential "that each conspirator was aware of all other conspirators." *United States* v. *Watson*, 669 F.2d 1374, 1379 (11th Cir. 1982) (citations omitted). The critical point, insofar as providing notice to a defendant of the accusation he must defend against at trial, is that "the breadth of a conspiracy is defined by the unlawful agreement." *United States* v. *Borchardt*, 698 F.2d 697, 702 (5th Cir. 1983). Because the grand jury particularly described the unlawful agreement which formed the theory of criminality herein, this Court is fully satisfied that the instant indictment was Constitutionally sound.

Having concluded that the conspiracy count was adequate to fulfill the obligations of noticing Piccolo of the charge against him and precluding a future double jeopardy risk from arising, it is appropriate to consider if events at trial either amended the indictment or permitted proof at variance therefrom. The distinction between an amendment and a

variance was succinctly stated in the polestar case of *United States* v. *Beeler*, 687 F.2d 340 (1978):

> A variance occurs when the proof at trial differs materially from the facts alleged in the indictment. In contrast, an amendment involves a change, whether literal or in effect, in the terms of the indictment. Amendments have been held to be prejudicial *per se* while variances may be subject to the harmless error rule. [Citations omitted]. Variances which create "substantial likelihood" that the defendant may have been "convicted of an offense other than that charged by the grand jury" constitute constructive amendments [requiring application] of the prejudicial *per se* approach to such variances.

587 F.2d at 342.

Though not specifically framed in terms of variance or amendment, the appellant would locate the indictment's "vagueness" in, *inter alia*, the denial of a bill of particulars, the failure to exclude the testimony of one Keith Smith (Smith), the admission of co-conspirator statements pursuant to *United States* v. *Vinson*, 606 F.2d 149 (6th Cir. 1979) and *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978), the government's closing argument, and the jury charge.

Initially, it appears that Piccolo's assertions regarding the bill of particulars, Smith's testimony, the co-conspirator statements[1] and the prosecutor's argument are all a form of argument directed to a variance between the language of the indictment and the proof permitted. Essentially, it is contended that evidence was admitted, such as Smith's testimony concerning other drug transactions, which was overbroad or at variance with the indictment, and which could have been cured by a bill of particulars or by limiting closing argument. In fact, the record discloses that no variance occurred. The

[1] We find no error in the trial court's decision to admit the co-conspirator statements under *Vinson* and *Enright*.

bill of particulars was denied because Piccolo had received, through extensive discovery, all of the information within the possession of the government except the identity and grand jury testimony of a single co-conspirator witness, which omission did not constitute a variance. *See United States* v. *Largent*, 545 F.2d 1039 (6th Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977). Further, the testimony of Smith as to Piccolo's involvement with drugs, though extending beyond the charged conspiracy, was not at variance with the indictment, but was consistent therewith in reflecting the operation of the conspiracy, *United States* v. *Archibold-Newhall*, 554 F.2d 665, 680-81 (5th Cir.), *cert. denied*, 434 U.S. 1000 (1977); that the criminal activity was "systematic", *Spencer* v. *Taxas*, 385 U.S. 554, 560-61 (1967); and constituted proof of intent or lack of accident or mistake. *See United States* v. *Reese*, 658 F.2d 1246, 1250-51 (6th Cir. 1977); *United States* v. *Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). The exhaustive discovery and evidentiary proceedings, as well as Smith's testimony, merely established that it was more probable than not that Piccolo knew what he was doing and that he willfully entered into and became a member of the charged conspiracy. Moreover, the trial court so specifically instructed the jury. This Court finds no variance between the charge of the indictment and the evidence admitted at trial.

Moreover, this Court finds no merit in the assertion that the jury instruction as to conspiracy impermissibly amended the indictment so as to place Piccolo at risk of conviction for simply furnishing cocaine to Marcangello without ever joining the conspiracy. The charge stated in pertinent part:

> In your consideration of the evidence in the case as to the offense of the conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. *If you conclude that the conspiracy did exist, you should next determine whether or*

not the accused willfully became a member of the conspiracy. If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed and that the defendant willfully became a member of the conspiracy either at its inception or afterwards, and that thereafter one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have succeeded in accomplishing their common object or purpose and in fact may have failed in so doing.

• • • •

Four essential elements are required to be proved to establish the offense of conspiracy charged in the indictment:

"First: That the conspiracy described in the indictment was willfully formed and was existing at or about the time alleged;

Second: *That the accused willfully became a member of the conspiracy;*

Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged; and,

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

(Emphasis added).

In addition, to the extent that Piccolo seeks review of the instruction on appeal, Fed. R. Crim. P. 30 bars a criminal defendant from assigning error to the charge absent an objection at trial. In the instant case there were two complete hearings on the proposed jury instructions during which both parties requested modifications, ten sections of the charge were

modified at defendant's request, and defense counsel pronounced himself satisfied with the final instructions. The rule is clear that a defendant under these circumstances may not obtain review of the instructions to the jury on appeal absent plain error. *United States* v. *Warner*, 690 F.2d 545 (6th Cir. 1982). Plain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice. *United States* v. *Thevis*, 665 F.2d 616, 645 (5th Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 57 (1982). This charge does not rise to plain error.

Accordingly, Piccolo's convictions on all counts are hearby AFFIRMED, and the matter remanded for re-sentencing on Counts II and III.[2]

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[2] As noted in both the original majority and dissent, it was improper to impose a single five year sentence upon Piccolo for the convictions obtained on Counts II and III of the indictment. This Court has held in *United States* v. *Woods*, 568 F.2d 509 (6th Cir.), *cert. denied*, 435 U.S. 972 (1978), and *United States* v. *Stevens*, 521 F.2d 334 (6th Cir. 1975), that while a defendant may be convicted of both possession with intent to distribute and distribution, he may not be sentenced on both counts, even if the sentences are made concurrent, when the only possession is immediately prior to distribution. Because it is unclear if Piccolo's single sentence was functionally a prohibited concurrent sentence or meant to apply only to a single count the matter must be remanded.

JONES, J. dissenting. As is apparent from the majority's recitation of the facts, there were numerous meetings between various individuals before the actual cocaine transaction was made. The evidence at trial established that Finnigan, Rassey, Allen and Marcangello met on at least three occasions while Allen, Marcangello and Piccolo also met on several occasions. The indictment charged a conspiracy to possess and distribute cocaine with overt acts which involved various persons whose names were both known and unknown. Because I view this indictment to be insufficient in that it was not specific enough to link the grand jury's concerns to the evidence presented by the prosecution at trial, I respectfully dissent.

Count one of the indictment makes a general charge of a conspiracy to possess and distribute cocaine. The appellant contends that the indictment was lacking in specificity in that it failed to state exactly what conspiracy Piccolo joined. It is urged by the government that the indictment adequately set out the object of the conspiracy, *i.e.* to possess and distribute cocaine. Further, it is argued that Piccolo was a member of it. The majority concludes that the indictment met the requirement of specificity for a conspiracy. Yet, under the rule of *Russell* v. *United States*, 369 U.S. 749 (1962), one of the purposes of the specificity requirement is to make sure that the indictment serves both as a check on the grand jury and as a link between the grand jury's considerations and the prosecution's presentation of its case. In my view of the indictment and the evidence, which can arguably be construed to establish two separate conspiracies, the check and link purpose of specificity required in *Russell* was not satisfied.

In *Russell*, the Supreme Court noted that it is difficult to imagine a case in which the insufficiency of an indictment results in its complete failure to inform the defendant of the nature of the accusation against him. Yet, when an indictment leaves "the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing

vicissitude of the trial, "369 U.S. at 768, it is invalid for it lacks in specificity and does not confine the prosecutor to a particular conspiratorial agreement. In such a case, when either the indictment fails to allege a specific conspiracy or when the proof at trial establishes the possibility of more than one conspiracy, the indictment's failure to name specific individuals as co-conspirators renders the indictment insufficient. The latter is clearly the case here.

In my opinion, the evidence presented at trial is suspectible to several constructions. The jury could very well have construed the evidence to establish two separate conspiracies — one between Finnigan, Rassay, Allen and Marcangello and another between Allen, Marcangello and Piccolo. Since this construction allows for the possibility that the jurors were not in agreement as to which conspiracy had been proven, the failure of the indictment to specify all known co-conspirators renders it insufficient. Moreover, I construe the evidence to be lacking because proof does not clearly establish that Piccolo entered into a conspiracy to make cocaine sales on a continuous basis as opposed to his merely agreeing to make the isolated sale which occurred on February 15, 1979. In each of these instances, the potential for a due process violation exists because of the uncertainty as to whether the grand jury which issued the indictment and the jury which rendered the guilty verdict had the same facts in mind. This important consideration was emphasized in *Russell* when the Court stated:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

369 U.S. at 770.

In light of the foregoing considerations, I remain of the view that the indictment failed to satisfy the *Russell* requirement of specificity. The government failed to ensure that the considerations before the jury at the close of the trial were the same as those before the grand jury at the time the indictment was issued. Therefore, I dissent.

No. 81-1238

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ANTHONY PICCOLO, *Defendant-Appellant.*	ON APPEAL from the Eastern District of Michigan, Southern Division.

Decided and Filed January 4, 1983

Before: KEITH and JONES, Circuit Judges; and BROWN*, Senior Circuit Judge.

JONES, Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. BROWN, Senior Circuit Judge, (pp. 19-23) filed a separate dissenting opinion.

JONES, Circuit Judge. Anthony Piccolo appeals his conviction by a jury for conspiracy to distribute, distribution, and possession of cocaine in violation of 21 U.S.C. § 846 and § 841(a)(1).[1] Piccolo received a five year sentence on the

* Circuit Judge Bailey Brown became a Senior Circuit Judge on June 16, 1982.

[1] 21 U.S.C. § 846 provides that:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. 841(a)(1) provides that:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

conspiracy count and a single five year sentence on the other two counts. Both sentences are to run concurrently.

On appeal, the defendant argues that vagueness in the indictment along with insufficient jury instructions and lack of specificity as to the nature of the charged conspiracy give rise to a host of reversible errors. Furthermore, he asserts that the court below erred in admitting the hearsay declarations of co-conspirators and evidence of past criminal practices.

We reverse the conspiracy count. Because of the multiplicity of the distribution and possession counts, we remand for resentencing.

I. FACTS

Joseph Finnigan, an undercover F.B.I. agent, came into contact with a Detroit attorney, Jerome Allen, in late 1978. Allen was involved in the narcotics trade. On February 1, 1979, according to Finnigan's testimony at trial, he and another agent, Joseph Rassey, met with Allen and John Blue. Blue was cooperating with the federal agents.

At this meeting, Finnigan and Rassey posed as individuals interested in purchasing cocaine. Allen and Rassey discussed a potential deal and Allen indicated that his source, Ernie Marcangello, could supply half a pound of cocaine. Later that evening, according to Finnigan, John Blue delivered a sample of cocaine to the agents. He claimed that he had obtained the sample from Allen and Marcangello.

Finnigan again met Allen on February 9th to discuss a purchase of cocaine. Five days later, in a telephone conversation, Allen stated that he had the cocaine and wished to make arrangements for the sale. They set the transaction for the next day, February 15th, at the Hyatt Regency Hotel.

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(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

On the fifteenth, Agent James Knopf, according to his own testimony, saw Allen drive to Marcangello's Detroit home. Allen testified that he asked Marcangello if he was interested in making the sale to Finnigan and Rassey. Marcangello, Allen stated, wished to make the sale, but claimed that he did not have the cocaine. Rather, "He had to get it from 'Pic'". After that interchange, Allen and Marcangello drove to a home in St. Clair Shores. This was the home of Anthony Piccolo.

Knopf and other agents saw Marcangello and Allen enter Piccolo's home and stay no more than 45 minutes. Allen testified that once inside the house, Marcangello and Piccolo went into the kitchen and out of his sight. When they came back, Allen and Marcangello left. Once in the car, Marcangello told Allen that he now "had it" and Allen presumed that he meant the cocaine. The pair proceeded to the Hyatt Regency.

Rassey and Finnigan, the two agents, met Marcangello and Allen in a room at the hotel. Finnigan expressed doubts about the quality of the cocaine and, according to Finnigan and Rassey, Marcangello and Allen, in response, both stated they had just come from the source. Finnigan testified that Marcangello produced four ounces of cocaine, that Rassey tested it and that Rassey then paid Marcangello $8,000.

The four men had additional discussions about the possibility of larger and regular purchases of cocaine. Rassey and Marcangello then left the room and went down to the hotel lounge. Rassey testified that Marcangello told him he could set up a cocaine deal and that his source was an Italian about twenty years older than himself. A half hour or so later, Allen and Finnigan joined Rassey and Marcangello and the meeting terminated.

Rassey testified that he had several more telephone conversations with Marcangello about further deals. Allen and Marcangello were arrested in June, 1979.

Allen testified that he had met Piccolo on a boat prior to

the sale and had had a telephone conversation during which Piccolo discussed "what kind of people" the two agents were. He testified, however, that he never discussed the sale of narcotics. Furthermore, Allen testified that he had on one occasion seen Piccolo give Marcangello a plastic bag with a white substance in it. He was not aware what this substance was, nor did he see money change hands. Finally, Allen testified that Marcangello informed him that Piccolo had made other sales of cocaine.

By an indictment handed down July 22, 1980,[2] defendant

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[2] The indictment reads as follows:

The Grand Jury Charges:

Count One

That from on or about August 1, 1977, and continuing thereafter up to and including June 21, 1979, within the the Eastern District of Michigan, Southern Division and elsewhere, ANTHONY PICCOLO, defendant herein, did knowingly, intentionally, and unlawfully, combine, conspire, confederate, and agree together with various other persons whose names are both known and unknown to the Grand Jury, to commit an offense against the United States, that is, to possess with intent to distribute, and to distribute various quantities of cocaine, a Schedule II, Narcotic Drug Controlled Substance, contrary to the provisions of Section 841(a)(1), of Title 21, United States Code; all in violation of Section 846, Title 21 United States Code.

It was part of said unlawful conspiracy that ANTHONY PICCOLO, defendant herein, and various co-conspirators would possess with intent to distribute and distribute said narcotic drug controlled substance (cocaine) within the Eastern District of Michigan, Southern Division, or would aid and abet each other in the distribution of said narcotic drug controlled substance (cocaine) within the Eastern District of Michigan and elsewhere;

In furtherance of said unlawful conspiracy, and to effect the objectives thereof, the defendant and various co-conspirators named herein, committed the following overt acts:

OVERT ACTS

1. On February 15, 1979, ANTHONY PICCOLO, defendant herein, met with A. Jerome Allen and Ernest Marcangello at Piccolo's residence located at 19710 Shady Lane, St. Clair Shores, Michigan.

2. On or about February 15, 1979, A. Jerome Allen and Ernest Eugene Marcangello travelled together to the

Piccolo was charged with conspiracy to possess cocaine with intent to distribute (count I), possession with intent to distribute (count II) and distribution of cocaine (count III).

Defendant filed a motion to quash the indictment, alleging, *inter alia*, that count I was not specific enough in detail to be upheld. In failing to adequately specify the nature, scope and goal of the conspiracy, defendant claimed that three interests were ignored. First, defendant could not prepare for trial. Second, the indictment did not adequately protect him from double jeopardy. Third, the indictment did not serve its function as a check against usurpation of the protection afforded by the grand jury or upon the grand jury itself. Defendant contends further that the conspiracy count did not indicate that the grand jury had considered each element of the offense with respect to the defendant and, moreover, it did not cabin the prosecutor's theory at trial.

The defendant also claimed the second and third counts

Hyatt Regency Hotel, Fairlane Town Center, Dearborn, Michigan.

3. On or about February 15, 1979, Ernest Eugene Marcangello distributed approximately 108 grams of cocaine at the Hyatt Regency Hotel, Fairlane Town Center, Dearborn, Michigan.

All in violation of Section 846, Title 21, United States Code.

Count Two

That on or about February 15, 1979, in the Eastern District of Michigan, Southern Division, ANTHONY PICCOLO, defendant herein, did knowingly, intentionally, and unlawfully possess with intent to distribute approximately 108 grams of cocaine, a Schedule II, Narcotic Drug Controlled Substance; in violation of Section 841(a)(1), Title 21, United States Code.

Count Three

That on or about February 15, 1979, in the Eastern District of Michigan, Southern Division, ANTHONY PICCOLO, defendant herein, did knowingly, intentionally, and unlawfully distribute approximately 108 grams of cocaine, a Schedule II, Narcotic Drug Controlled Substance; in violation of Section 841(a)(1), Title 21, United States Code.

THIS IS A TRUE BILL

of the indictment were multiplicitous and moved for a bill of particulars.

The court rejected all the defendant's motions, stating that the indictment was specific, not multiplicitous, and that a bill of particulars was not necessary because must of the evidence had apparently already been given to the defense.

At the opening of the trial, the defense made a motion *in limine* challenging the admission of co-conspirators' statements. The court held that it would admit the statements and determine at the close of evidence whether our test in *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978) had been met. At the close of the evidence, the court ruled that the government had met its burden under *Enright*, and that the statements were thus properly admitted. At this point, the defense made a motion to dismiss which included his claim that the conspiracy count could not stand because there was no specificity in the charge and thus no evidence to support it.

The jury found the defendant guilty on all three counts.

II. The Conspiracy Count

The pervasive theme running through defendant's claims below and before this Court concern the vagueness of the conspiracy alleged. In short, the defendant claims that, from the outset of the trial to the verdict, there was an absence of specificity on the issue of exactly which conspiracy Mr. Piccolo allegedly joined: the indictment was not specific; the court rejected his request for a bill of particulars; in ruling upon the defendant's motion *in limine*, the court failed to specify what conspiracy the defendant joined and failed to make specific findings as to whether the statements offered were in furtherance of the yet unstated goal or purpose of that conspiracy. Moreover, the government's opening and closing arguments did not clarify the vagueness but, rather, pronounced general principles concerning a conspiracy to sell

narcotics. The government developed the facts concernig the sale at the Hyatt and the "pick-up" at Piccolo's home but did not develop evidence that established Piccolo's agreement with Allen or Marcangello to sell narcotics to the agents. While it is clear that there is evidence that there was some agreement to sell narcotics, the defendant argues that more specificity is needed for the conviction to stand.

The government on appeal argues that there was no error in the lower court's management of the conspiracy count and that the indictment was sufficient. In sum, it argues that the jury and the defendant had all the specifics each needed with respect to the conspiracy count to effectively carry out their tasks. We disagree.

The purpose of requiring specificity in the indictment was discussed by the Supreme Court in *Russell* v. *United States*, 369 U.S. 749 (1962). The court noted three major factors to be considered in determining whether an indictment is sufficient. First, the indictment should be tested in light of its notice function. It is essential that the charging paper "'sufficiently apprises the defendant of what he must be prepared to meet.'" 369 U.S. at 763. Second, the indictment must be of sufficient specificity to protect the defendant from double jeopardy. Finally, the indictment serves both as a check on the grand jury and as a link between the grand jury's considerations and the prosecutor's case at trial. As the court noted:

> A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow a prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

369 U.S. at 770. (citations omitted).

We have recognized the importance of this third function of the indictment in *United States* v. *Dickerson*, 337 F.2d 343, 346-47 (6th Cir. 1964) and *U.S.* v. *Beeler*, 587 F.2d 340, 342 (6th Cir. 1978). The Second Circuit, in *United States* v. *Silverman*, 430 F.2d 106 (2nd Cir. 1970), noted that an element of this third function is to prevent the "prosecutor from modifying the theory and the evidence upon which the indictment is based." 430 F.2d at 110, *citing*: 8 *J. Moore*, FEDERAL PRACTICE ¶ 7.05[3] (2d. Ed.).

In *Russell*, the court characterized the defendants' dilemma as follows:

> Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large — to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.

369 U.S. at 768.

Similarly, the first count of the indictment here, while satisfying the double jeopardy function[3] and, along with the information passed by the prosecution to the defense, the notice function, is not specific enough to cabin the prosecutor and prevent him or her from "roaming" at large. Our doubts about the specificity of the conspiracy count are heightened by the subsequent events at trial. The dangers that the Supreme Court warned against in *Russell* appear in this case in both the admission of the co-conspirator's testimony and in charging the jury.

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[3] We are not troubled by the double jeopardy problems here because the *amount* of narcotics, the dates and the location of the sale are in the indictment. It is not which sale or whether there was an illicit agreement that is unclear, rather we find the failure to adequately characterize the extent of the conspiracy and the factors that tie Piccolo to that conspiracy of concern.

A. The Co-conspirator's statements

Federal Rule of Evidence 801(d)(2)(e) permits the introduction of hearsay testimony of co-conspirators.[4] In *United States* v. *Vinson*, 606 F.2d 149 (6th Cir. 1979), we recognized that a trial judge must have considerable discretion to control the mode and order of proof at trial. Thus, we held that, in determining whether or not to admit the hearsay, the judge need not make a ruling prior to the admission of the evidence. Rather, the judge may admit the evidence subject to a later determination that it is admissible. 606 F.2d at 153. That determination is to be made according to our holding in *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1970), which requires that the government show by a preponderance of the evidence that (1) a conspiracy existed, (2) the defendant against whom the hearsay is admitted is a member of that conspiracy, and (3) the hearsay statement was made in furtherance of the conspiracy. *Id.* at 986. *Accord*, *Vinson*, 606 F.2d at 152.

We find no error in this case with the trial judge admitting the statements in evidence and later ruling on their admissibility. *Vinson* clearly sanctions such procedures. We have doubts, however, about the lack of specificity in the judge's ruling on the *Enright* factors. These doubts are accentuated by the lack of specificity in the indictment and the continued unavailing protestations of the defense counsel to that effect.

Before this Court, the defendant argues that four statements admitted should have been excluded. They are (1) Finnigan's testimony that Marcangello and Allen stated that

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[4] Federal Rule 801(d)(2)(e) provides that:

> . . . (d) *Statements which are not hearsay*: A statement is not hearsay if — . . . .
>
> (2) *Admission by party-opponent*. The statement is offered by a party and is . . .
>
> (E) A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

they had come straight from the source, (2) Rassey's testimony to the same effect, (3) Allen's testimony that Marcangello told him that he had to get the cocaine from "Pic" and (4) the testimony by Rassey that a tape recorded conversation had a reference to "Pic".

The defendant contends (1) that there is insufficient evidence to link him with any conspiracy such that these statements should be admissible, (2) that the remarks were not in furtherance of the conspiracy, but were "mere conversation" and (3) that even if he joined the conspiracy, he did not do so until after the conversation.

We can dispose of the third objection without delay. In *United States* v. *Cassity*, 631 F.2d 461 (6th Cir. 1980), this Court made clear that when an ongoing conspiracy is established, the statements of the co-conspirators made in furtherance of that conspiracy and made prior to the defendant's joining may be admissible against him at trial.[5]

With respect to the sufficiency of the evidence to support the judge's determination below, we cannot agree with the defendant that there is not a preponderance of the evidence for the three prongs of the *Enright* test. While we share the defendant's reservations that the vagueness of the indictment and of the judge's findings on the *Enright* test shed some doubt on the conclusions reached, we cannot say that the admission was error.

There seems to have been some confusion at trial as to whether the *Vinson* and *Enright* cases allow the statements offered to be used in determining whether there is a preponderance of evidence to show the defendant belonged to the

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[5] This is, of course, not to diminish the stringent requirements that the statements must be otherwise admissible and must meet the *Enright* test.

Moreover the cases relied upon by the defendant, *United States* v. *Smith*, 578 F.2d 1227 (8th Cir. 1978) and *United States* v. *Killian*, 524 F.2d 1268 (5th Cir. 1975) are simply not relevant here. Both those cases deal with admissions against the defendant that are made by co-conspirators *after* termination of the conspiracy.

conspiracy. *Vinson* permits the judge to take the statements offered as evidence in making the *Enright* determinations. 606 F.2d at 153. With that in mind, we can review the evidence in this case.

The evidence establishes that there was a conspiracy between Allen and Marcangello to sell cocaine to agents Finnigan and Rassey. The central question here, however, is whether there exists a preponderance of the evidence to establish that Piccolo entered into the illicit agreement. It is only upon that finding that the *Enright* test is met.

The government urges that such a preponderance is made out. Allen and Marcangello were to make the sale of cocaine on the 15th. That evening, Marcangello told Allen he did not have the cocaine, but would have to get it from "Pic". Furthermore, Allen and Marcangello travelled to Piccolo's house. Although Allen did not see the actual transfer of drugs, upon leaving the house Marcangello stated he had them. In the hotel, Allen and Marcangello stated that they had come straight from the source. They said that their source could supply ample amounts of cocaine in any future deal. In addition, there is some evidence that Piccolo had been involved in other drug transactions.

While the evidence does not expressly warrant the belief that Piccolo adopted the plan or conspiracy's goal, we think that the evidence is enough to meet the preponderance test. Given the nature of the transaction and the amount of drugs involved, we do not find it clearly erroneous to infer knowledge and acquiescence in the plan by Piccolo.

Yet, the defendant urges that the remarks made by Marcangello that they had come straight from the source, and that he had to get the "cocaine from 'Pic'" do not satisfy the third prong of the *Enright* test – that they be in furtherance of the conspiracy. While we think that these remarks clearly do fall within that area, the dangers inherent in the trial judge's failure to make specific findings on this point become clear.

In *United States* v. *Eubanks*, 591 F.2d 513 (9th Cir. 1979),

the Ninth Circuit addressed the scope of the "in furtherance requirement." While not all statements made by co-conspirators are in furtherance of the conspiracy, those that "further the common objectives of the conspiracy" are admissible.[6]

The defendant's argument that the hearsay declarations involved in this case are mere conversation must fail. The hotel room statement that Allen and Marcangello had come straight from the source were made in response to a statement by Finnigan that he was concerned about the quality of the narcotics. It was intended, no doubt, to allay Finnigan's fear that the cocaine had been diluted. Moreover, the statement to Allen by Marcangello that he would get the cocaine from "Pic", could have been to allay Allen's fear that Marcangello would not deliver. Statements made to give confidence to those involved in the transaction may be in furtherance of the conspiracy. *United States* v. *McGuire*, 608 F.2d 1028, 1032-33 (5th Cir. 1979). We think that the remarks here clearly fall within that category.

That is not to say that there is no confusion as to which conspiracy the remarks furthered. The admission of the evidence without specific findings as to exactly which conspiracy the remarks furthered, gives rise to substantial dangers, These dangers were made evident in *United States* v. *Fielding*, 630 F.2d 1357 (9th Cir. 1980). There, the trial judge admitted statements that were clearly made to induce further drug sales. The indictment, however, was for sales within a particular period. The Court of Appeals found clear error in admitting the evidence because the statements were made in furtherance of a new conspiracy. The common objectives of the conspiracy for which the defendant was indicted were not

[6] In that case, a conspirator's report to his commonlaw wife about what had transpired was deemed not in furtherance because it was not made to induce her continued cooperation. Similarly, in *United States* v. *Castillo*, 615 F.2d 878 (9th Cir. 1980), the court found a statement made by one co-conspirator, to a trusted friend, that he was going to kill someone was not in furtherance, but was mere casual conversation.

furthered by those remarks. Trial judges must make clear what they find to be the objectives of the conspiracy established by a preponderance of the evidence under the *Enright* test.[7] Only then can the in furtherance requirement effectively be followed. This is especially so in a case, such as this, where the indictment is vague and the defendant raises an objection to the inchoate nature of the conspiracy charged.[8]

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[7] Clarity is needed because of the ruling in *Cassity* which allows the hearsay evidence to be used in considering whether it is admissible. While we do not doubt the wisdom of the rule, we note that it should be carefully employed. Other circuits, it should be noted, adhere to a rule that the evidence cannot be used and that the *Enright* test must be met with independent evidence. *See United States* v. *James*, 590 F.2d 575 (5th Cir. 1979); *United States* v. *Bell*, 573 F.2d 1040 (8th Cir. 1978). While not subscribing to that view, we think that Judge Coffin's caution in *United States* v. *Martorano*, 557 F.2d 1, 12 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978) that such evidence ought to be given little weight by the court in determining whether a proper foundation for admission has been established is good sense. Moreover, the hearsay evidence ought not to be the *only* evidence to consider in applying the *Enright* standard. *See Martorano, supra*. Second, since we have allowed a preliminary showing to be postponed under *Vinson*, the "in furtherance" requirement needs to be carefully applied so as to not make *Enright* a meaningless rule. To carefully apply that standard, close examination of the specific statements and the specific allegations of conspiracy are needed.

Here, we think there is independent evidence that tends to meet the preponderance requirement for the finding that Piccolo was a member of the conspiracy. The amount of the narcotics, the trip to his home, the previous dealings with Allen and statements made to him by Piccolo all provide some basis, independent of the hearsay statements, upon which to premise a conspiracy between Piccolo and the others. The hearsay statements provide additional support. Moreover, see footnote 8 concerning the "in furtherance" requirement in this case.

[8] Here, we do not find that Piccolo was harmed by the failure to make clear the findings. First, unlike *Fielding*, there is no problem that the remarks were made in furtherance of a conspiracy for future sales. The remarks involved here all relate to and further the particular sale that occurred at the Hyatt. The vagueness creates a problem not for the furtherance requirement but for the issues as to whether Piccolo joined the illicit agreement and what the limits of that agreement were. There is little doubt that whatever the agreement was, it included the sale to the agents.

B. The Jury Charge

The most damaging effect of the failure to fully articulate the theory of conspiracy upon which the government was proceeding came at the jury instruction stage. The judge gave merely a general charge upon the law of conspiracy [see Appendix] without relating the law to the facts of the case.

While the instructions are correct legal principles, they do not adequately inform the jury as to their task. A judge has a duty to give instructions that are meaningful and translated, not in terms of mere abstract law, but into facts of the particular case. *Choy* v. *Bouchelle*, 436 F.2d 319 (3rd Cir. 1970); *Mitchell* v. *United States*, 394 F.2d 767 (D.C. Cir. 1968); *Marshall* v. *Isthmian Lines*, 334 F.2d 131 (5th Cir. 1964).

Failure to meet that duty is particularly a problem when, as here, the conspiracy theory is *never* made clear to the jury in terms of specific facts of the case. In the indictment, as we have seen, the prosecution did not make clear the limits of the agreement or the objective of the conspiracy. As the appellant phrased it, the indictment "relegates the grand jury function to the writing of a blank check which the prosecutor can fill in at trial with facts that may not have formed the basis for the indictment." Brief in Support of Motion to Quash Indictment at p. 3. In both the closing and opening arguments, the prosecution failed to link the elements of the charged offense to specific and identifiable facts in the case. The trial judge bears a special responsibility to make clear which facts the jury must find to sustain a conviction. Here, the jury charge was insufficient.

It is beyond dispute that the essential ingredient in the crime of conspiracy is agreement. While that agreement need not be shown by formal or direct evidence, the jury must specifically consider what agreement underlies the crime alleged. Nowhere in the proceedings is this made clear to the jury. The task of the judge, in his or her charge, is to adequately guide the jury. The ambiguity in the indictment and subsequent argument should have been corrected at the in-

struction stage.[9] Without an instruction that sets out specifically what acts would constitute Piccolo's agreement in the conspiracy count, the jury could not adequately consider the conspiracy count. The jury found that Piccolo sold narcotics to Marcangello. They also may have found that Marcangello and Allen were involved in a conspiracy to sell narcotics. What they needed to consider and find is that Piccolo shared in that conspiracy.

The instructions given merely stated that willful participation is needed. The jury may merely have found that Piccolo willfully sold the narcotics, and concluded that this was enough to make him part of the conspiracy. Yet, that is not enough for agreement, they must find that he willfully acted with the intent to further the conspiracy.[10]

Where, as here, there is substantial evidence to support a conviction on the substantive count, there is a great danger in allowing a conspiracy count to go to the jury without specific instructions. The admonition in *Russell* v. *United States*, *supra*, that a specific indictment is needed to check the prosecutor and provide insurance against the jury finding the defendant guilty on a charge the grand jury never considered

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[9] It is interesting to note that even the judge in this case was not clear on exactly which relationship the government was attemping to prove between the alleged conspirators. In the discussion concerning a proposed principal/agent charge, the judge stated, "my concern is that if we accept the government's testimony and/or evidence in its best light, that the relationship between Marcangello and Piccolo has been ill defined and the question I asked myself and present to you and Mr. Penta is whether the inclusion of an instruction relating to the principle agency and constructive possession would cause a confusion to the jury . . ." Tr. III, 84.

[10] The dissent claims that the "charge" did make clear that, to find Piccolo guilty, the jury must find that he willfully participated in the conspiracy (p. 3) and thus our holding that the charge was not specific must fail. This simply misses the point. We recognize that the jury was instructed that they must find some willful participation. On the instructions given, the jury may have found the sale willful, but have not considered whether Piccolo knew of or intended to participate in the conspiracy. Yet, the conspiracy count is not proven merely by showing the underlying offense, one must show willful and *intentional furthering of a common and accepted goal.*

is all the more poignant when nowhere in the trial is the charge made clear. We cannot allow the conspiracy conviction to stand.[11]

The government urges that Fed. Rule Civ. Proc. 51 prohibits this Court from considering the charge to the jury because the defendant did not raise an objection to the specificity of the instructions below.[12] We cannot agree. While at first it seems that Rule 51 bars any review when there is no objection at trial, this Court, as well as nearly all the circuits, has recognized that there is a narrow exception to the general rule where an objection would have been a mere "formality" under the circumstances, or where the error was "obvious and prejudicial". See *Batesole* v. *Stratford*, 505 F.2d 804 (6th Cir. 1974)(collecting cases). This Court has recognized that the underlying purpose of the rule is to prevent needless retrials by affording the trial judge a chance to think over the instructions in light of potential objections on appeal. *Moore* v. *Stephens*, 271 F.2d 119 (6th Cir. 1959).

Here, the defense raised the claim that the whole conspiracy count was vague from the onset of the proceedings. He raised it numerous times and found the court unreceptive. When

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[11] The dissent contends that our holding is internally inconsistent because we, on the one hand, hold that the court did not err in admitting the statements of the co-conspirators and, on the other, that the conviction must be reversed because the conspiracy was never made clear. Slip op. at 22. This claim misses the distinction between the standards to be applied in each situation. As noted above, the co-conspirator's statements can be admitted on a mere *preponderance* of the evidence including the statements to be admitted. Yet, the jury must find, *beyond a reasonable doubt*, that each and every element of the offense is present. It is not at all inconsistent to hold that while there is a preponderance of the evidence to support the admission of co-conspirator statements, the jury was not properly instructed so as to be able to adequately consider each and every element of the offense, or that the conspiracy alleged may not have been the conspiracy the jury found.

[12] Rule 51 provides in relevant part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Fed.R.Civ.P. 51.

he requested a principal/agent instruction, the judge stated he thought that it was not a good instruction because it might further confuse an already confusing set of allegations. At the close of evidence, under the guise of a motion to dismiss, defendant again raised the claim that the conspiracy alleged was vague. We cannot say that the defense was lax in bringing the problem to the court's attention.[13]

II. Counts II and III

The defendant raises several objections to his conviction and sentence on Counts II and III of the indictment.[14] The most sigificant objection is his claim that the two counts are multiplicitous. The government argues that since the trial

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[13] Aternatively, an appellate court may reverse for plain error in an instruction, even when not objected to, to prevent a miscarriage of justice. *See* 9 *Wright & Miller* FEDERAL PRACTICE AND PROCEDURE § 2558 (1971) collecting cases.

When the factual issues are complex, it is plain error not to instruct the jury with specific facts from the case at hand. *Choy* v. *Bouchelle, supra. cf. United States* v. *Holley*, 502 F.2d 273, 275-76 (4th Cir. 1974) (law must be applied within the context of the facts as developed; instructions cannot have "abstract quality divorced from the concrete facts of the case"); *Mitchell* v. *United States*, 394 F.2d 767, 770 (D.C. Cir. 1968) (the jury charge "should be drawn with reference to the particular facts of the case on trial").

[14] The government argues that on appeal we should not consider the defendant's contentions with regard to the conspiracy count, because we should exercise our discretion under the "concurrent sentence doctrine." We cannot do so. While the Supreme Court indicated that the rule may have some continued validity as a rule of judicial convenience, *Barnes* v. *United States*, 412 U.S. 847; *Ethridge* v. *United States*, 494 F.2d 351, *cert. denied*, 419 U.S. 1025 (1974); *United States* v. *Burkhart*, 529 F.2d 168 (6th Cir. 1976), it is simply not applicable here. As is admitted by the government, that rule is used to avoid the issues on review of one count of the indictment when the court will leave the concurrent sentence on the remaining count intact and, as we noted in *Ethridge* and *Burkhart*, there is "no basis under which our resolution of this appeal could have any effect upon the appellant's imprisonment or subsequent parole, or for that matter enjoyment of life." *Burkhart*, 529 F.2d at 169. Moreover, there is the obvious requirement that there *be* concurrent sentences. We need go no further than realize that this latter requirement is not satisfied here. Piccolo received a five-year sentence on count I. Though the government urges that the single five-year sentence on counts II and III is a "concurrent sentence" for the purposes of the doctrine, that

judge gave Piccolo a *single* five year sentence on the two counts, the defendant cannot complain. It cites our holdings in *United States* v. *Stevens*, 521 F.2d 334 (6th Cir. 1975) and *United States* v. *Woods*, 568 F.2d 509 (6th Cir.), *cert. denied*, 435 U.S. 972 (1978) where we held that a defendant cannot be sentenced on both possession with intent to distribute and distribution. In those cases we merely vacated one of two concurrent sentences on multiplicitous counts. The Government contends that here the single sentence gives the defendant what he would be entitled to were he to win on appeal.

The government's reasoning cannot stand. While it is clear that the trial judge granted a single sentence on counts II and III, it is precisely for that reason that *Woods* and *Stevens* do not apply with respect to the issue of remedy. Here, there is no evidence that the trial judge considered five years on one of counts II and III to be adequate and proper sentencing. The judge may have considered five years adequate for *both* and have intended the sentence to cover *both* counts. Thus, the case must be returned for resentencing in light of the fact that the defendant cannot be sentenced on both counts II and III.

We find the defendant's other objections with regard to counts II and III without merit.

In sum, because of the pervasive lack of a specific theory of conspiracy, the vague indictment on the conspiracy count, and the failure of the trial judge to adequately instruct the jury by tying the abstract legal instructions to the specific facts of the case, we reverse the defendant's conviction on count I. We remand the case for resentencing in light of the fact that the defendant cannot be sentenced on both counts II and III.

It is so ORDERED.

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is not the case. Piccolo cannot be sentenced on both counts II and III, and as we note below, we cannot determine whether the five-year single sentence is an aggregate sentence for the two counts. That being the case, we cannot hold that there is a legitimate concurrent sentence that can serve as a prerequisite for an exercise of discretion under the concurrent sentence rule.

BAILEY BROWN, Senior Circuit Judge. I respectfully dissent as to the reversal of the conviction of conspiracy and concur that the case must be remanded for resentencing as to the substantive counts.

I

The panel's opinion does not make clear whether it holds that the conspiracy count of the indictment is fatally defective and that the conviction is reversed on that ground. The opinion points out that an indictment must give adequate notice to the defendant, must protect the defendant from double jeopardy, and must serve as a "check on the grand jury and as a link between the grand jury's consideration and the prosecutor's case at trial." The opinion then states that the conspiracy count passes muster as to the first two requirements but fails as to the third, stating that it

> [I]s not specific enough to cabin the prosecutor and prevent him or her from "roaming" at large. Our doubts about the specificity of the conspiracy count are heightened by the subsequent events at trial.

Slip at ————.

I say that the opinion is not clear whether it holds that the conspiracy count of the indictment is fatally defective because, after making the above statement, it seems to hold that such defect could have been cured if the district court had tailored the instructions to the evidence and had specifically described the conspiracy that must be proven to find the defendant guilty. The opinion even seems to indicate that the indictment might have been effectively cured if the prosecutor had been more specific in his argument to the jury.

In any event, it seems to me that the indictment is sufficiently specific to make sure that the defendant is actually tried for the offense that the grand jury had in mind when it indicted. All of the overt acts alleged clearly zero in on the

claimed conspiracy under which defendant Piccolo, at his home, delivered a substantial amount of cocaine to Marcangello who, with Allen, left the home and delivered it to the undercover agents. The overt acts may be relied upon in so construing the indictment. *United States* v. *Pheaster*, 544 F.2d 353, 362 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977); *United States* v. *Heinze*, 361 F.Supp. 46, 50 (D.Del. 1973).

The opinion also seems to hold, as a separate proposition, that the conviction must be reversed because the district court did not tailor the charge to the facts in evidence even though there was no objection to the charge.[1] It seems to me that the conspiracy alleged and proven here was not so complicated as to confuse the jury and to make more specific instructions imperative. The conspiracy charged and proven was as above briefly set out although there was other evidence introduced to show that Piccolo likely had a supply of cocaine and where he obtained it.

The opinion also states that the charge is defective in that it does not make clear that, for a conviction, it was necessary to prove that Piccolo knowingly participated in the conspiracy. The opinion states:

> Without an instruction that sets out specifically what acts would constitute Piccolo's agreement in the conspiracy, the jury could not adequately consider the conspiracy count. The jury found that Piccolo sold narcotics to Marcangello. They also may have found that Marcangello and Allen were involved in a conspiracy to sell narcotics. What they needed to consider and find is that Piccolo shared in that conspiracy.

Slip at ———.

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[1] The panel opinion does not actually hold that the failure to object to the charge in this respect is excused under the "plain error" rule, Rule 52(b), FED.R.CRIM.P.; rather, it relies on the proposition that the failure to object would have been a "formality" and the error was "obvious and prejudicial," citing *Batesole* v. *Stratford*, 505 F.2d 804 (6th Cir. 1974), a civil (diversity) case. The panel opinion does indicate (Slip at ——— n.12) that the "plain error" rule could have been relied on alternatively.

On the contrary, the charge did make clear that, to find Piccolo guilty, the jury must find that he wilfully participated in the conspiracy. The charge included the following:

> In your consideration of the evidence in the case as to the offense of the conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. *If you conclude that the conspiracy did exist, you should next determine whether or not the accused wilfully became a member of the conspiracy. If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was wilfully formed and that the defendant wilfully became a member of the conspiracy either at its inception or afterwards,* and that thereafter one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have succeeded in accomplishing their common object or purpose and in fact may have failed in so doing.
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> • • • •
>
> Four essential elements are required to be proved to establish the offense of conspiracy charged in the indictment:
>
> "First: That the conspiracy described in the indictment was wilfully formed and was existing at or about the time alleged;
>
> Second: *That the accused wilfully became a member of the conspiracy;*
>
> Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged; and,
>
> Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.
>
> (Emphasis added).

The panel opinion is internally inconsistent. On the one hand, it holds that the district court did not err in allowing into evidence statements of co-conspirators as being in furtherance of the conspiracy and yet holds that the conspiracy as charged in the indictment and as *not* specifically defined in the instructions is so nebulous as to require reversal of the conviction. It seems to me that implicit in this holding that the district court did not err in allowing into evidence, for consideration of the jury, the co-conspirators' statements is the proposition that the conspiracy was sufficiently defined in the indictment to support such a ruling by the district court.

I recognize the validity of the concern where the conspiracy charged and the proof are complicated, but this is not such a case. It might well have been better for Judge Cook in his instructions to have more specifically described the conspiracy charged and in support of which there was sufficient trial evidence, but his failure to do so is not, in my view, reversible error.

Accordingly, I would affirm as to the conspiracy count.

II

With respect to Counts II and III, the possession with intent to distribute and the distribution counts, the district court did not impose a sentence on each count and instead imposed a single "general sentence" of five years. Such a "general sentence" is not *per se* illegal but general sentences are adversely criticized and are not preferred. *See* 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 527 at 417 (1969). I suppose the district court so imposed the sentence in an attempt to avoid the problem pointed up by our court in *United States* v. *Stevens*, 521 F.2d 334 (6th Cir. 1975). There, our court held that where a defendant is convicted of possession with intent to distribute and distribution, and the convictions are based only on a possession immediately before transfer and then

transfer, while both convictions stand, a sentence may not be imposed under each count, even if made concurrent. Our court remanded only for vacation of one of the sentences. The rationale is that Congress did not intend for punishment to be imposed under each count under such circumstances. Applying this rationale, it appears to me that the sentence here violates the principle established by *Stevens* in that a sentence was imposed on both counts. Accordingly, I believe that, as is the result prescribed by the panel opinion, the cause should be remanded for resentencing.